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FREQUENTLY ASKED QUESTIONS ABOUT COPYRIGHT IN HIGHER EDUCATION

I. The Basics

What is copyright?

Copyright is the doctrine of federal law that invests the “author” of an original creative work that is “fixed in a tangible medium of expression” with certain exclusive rights to that work for a limited period of time and subject to certain defined and certain implied limitations. The Copyright Act of 1976 is set out in Title 17 of the United States Code. It was amended in 2002 to address issues raised by distance education transmissions of copyrighted materials.

What does copyright protect?

Copyright gives the copyright holder the right to reproduce the work, publish and distribute the work, adapt the work, or perform or display the work. If you are not the copyright holder and you do any of those things with a copyrighted work, you run the risk of infringing the copyright.

A work whose copyright has expired, or that was never copyrighted in the first place, is said to be “in the public domain” and may be freely reproduced, performed, displayed, or otherwise used without restriction.

What kinds of works can be copyrighted?

- Literary works
- Musical works
- Dramatic works
- Choreography

- Pictorial, graphic and sculptural works
- Motion pictures
- Sound recordings
- Architectural works
- Compilations and databases of any of the above categories, to the extent they reflect original thought in the selection or arrangement of the elements.

What kinds of works cannot be copyrighted?

- Facts
- Ideas
- Processes or Procedures
- Concepts
- Principles
- Systems or methods of operation
- Discoveries
- Works created by an officer or employee of the United States Government, acting within the scope of his or her official duties.

How does a work become copyrighted?

Prior to 1978, “© year name” or “copyright” or similar was required to be affixed to any work intended to be copyrighted, and failure to so affix waived the copyright. Since 1978, this is no longer true and any covered creative work is automatically subject to copyright rights. A copyright owner can enhance his or her chances of prevailing in a copyright infringement suit by affixing a copyright notice to the work and by registering the copyright with the federal government, but neither is a prerequisite.

How long does copyright last?

In the United States, all works published before 1923 are in the public domain and most works published after 1977 are protected for the life of the author plus 70 years. Works created and/or published between 1923-1977 are subject to a potentially shorter copyright (see chart below). Nevertheless, a general rule of thumb is that if the work you want to use is under copyright now, it will be under copyright until after you retire.

DATE OF WORK	PROTECTED FROM	TERM
Created 1-1-78 or later	When work is fixed in tangible medium of expression	Life + 70 years (or if work of corporate authorship, the shorter of 95 years from publication, or 120 years from creation).

Published before 1923	In public domain	None.
Published from 1923 - 63	When published with notice	28 years + could be renewed for 47 years, now extended by 20 years for a total renewal of 67 years. If not so renewed, now in public domain.
Published from 1964 - 77	When published with notice	28 years for first term; now automatic extension of 67 years for second term.
Created before 1-1-78 but not published.	1-1-78, the effective date of the 1976 Act which eliminated common law copyright.	Life + 70 years or 12-31-2002, whichever is greater.
Created before 1-1-78 but published between then and 12-31-2002.	1-1-78, the effective date of the 1976 Act which eliminated common law copyright.	Life + 70 years or 12-31-2047 whichever is greater.

(Chart courtesy of Lolly Gasaway, University of North Carolina)

<http://www.unc.edu/~uncnlg/public-d.htm>

For a more detailed explanation of when a copyright on a particular type of work expires, please see Peter B. Hirtle's *Copyright Term and the Public Domain in the United States*:

http://www.copyright.cornell.edu/public_domain/

What are the risks of infringing a copyright?

The potential penalties for infringement can be very harsh, and can be levied against individuals as well as institutions. A court can award up to \$150,000 for each separate act of "willful infringement," which means that you knew you were infringing and you did it anyway. Ignorance of the law, though, is no excuse. If you don't know that you are infringing, you still will be liable for damages - only the amount of the award will be affected. In addition, an award of damages can include attorneys' fees for the other side. Bottom line: you don't want to be found to have infringed a copyright in a lawsuit.

Gee, that sounds bad. But we use copyrighted materials in teaching all the time! How can I make sure I don't get sued?

There are two ways to use copyrighted works without getting sued. Either:

- (1) Obtain permission or purchase a license to use a copyrighted work; or
- (2) Use excerpts of copyrighted works without specific permission under the “Fair Use” exception described in Section 107 of the Copyright Act, “including such use . . . for purposes such as criticism, comment, news reporting, teaching (including multiple copying for classroom use), scholarship, or research[.]” Some, although not all, use of copyrighted works in teaching falls within the “fair use” exception.

II. Using Copyright-Protected Works in the Classroom

What is “fair use”?

Generally, fair use is any copying of copyrighted material done for a limited and “transformative” purpose. The most common recognized “transformative” purposes are commentary, criticism, and parody. Although parody is almost never an infringement of copyright, commentary and criticism can still get you in trouble if you quote too extensively or otherwise dilute the value of the copyright or do it for the wrong – usually, commercial – reasons. Whether or not your use of copyrighted work falls within the boundaries of fair use is determined by looking primarily at four factors:

1. **The purpose and character of the use.**

Factor 1 calls for a judgment of where a use falls on a spectrum of possible uses. Educational use by a nonprofit organization is on the far (safe) end of Factor 1. Selling an item containing copyrighted work for profit (for example, pirated movies or software, bootleg Louis Vuitton handbags) is on the other end.

2. **The nature of the copyrighted work.**

Even if you are using work for nonprofit educational purposes, you can be guilty of infringement of copyrighted educational materials. For example, if the copyrighted work is a textbook or other material intended for sale for educational uses, it is much less subject to fair use in classrooms than other types of materials

3. **The amount and substantiality of the portion used relative to the copyrighted work as a whole.**

If the work is a 1000 page tome and you quote two pages of it, you are probably safe. If the work is a short poem or essay, you may be safe quoting the entire thing because it is impossible to quote less than that. Everything between those extremes is a judgment call.

4. **The effect of the use on the potential market for or value of the copyrighted work.**

Effect of the use can take two forms. First, is the use you are making the one the copyright holder mainly meant to use (for example, a textbook used in class, or an entire novel copied into your coursepack instead of having students purchase the book). Second, even if the use you are making is not the primary one, are you making copyrighted material available in such a way as to dilute the market (for example, are you making digital media available for legitimate purposes but in a way that can be easily pirated and redistributed?)

That sounds complicated. Are there any shortcuts for figuring out what I can do?

Yes! As part of the debates leading up to the Copyright Act of 1976, a number of publishers, authors, and education associations developed a set of “safe harbor” guidelines for the fair use of reproductions of copyrighted work by teachers in nonprofit educational institutions. These guidelines have since been endorsed by the American Council on Education and cited in many court decisions. Under the “Classroom Guidelines,” faculty members will not violate copyright laws by making a **single copy** for scholarly or research purposes of:

- A chapter from a book
- an article from a periodical or newspaper
- a short story, short essay, or short poem
- a chart, graph, diagram, drawing, cartoon, or picture

Faculty are also safe making multiple copies for classroom use of materials that meet the following restrictions:

- Brevity: this means (i) a complete poem if less than 250 words and if printed on not more than two pages or (ii) an excerpt of not more than 250 words from a longer poem (though either limit may be expanded to permit the completion of an unfinished line); (iii) a complete article, story, or essay consisting of less than 2,500 words or (iv) an excerpt of not more than 1,000 words or 10% of any other prose work, whichever is less, but in any event a minimum of 500 words (though either limit may be expanded to permit the completion of an unfinished paragraph); (v) a single chart, graph, diagram, drawing, cartoon, or picture per book or per periodical issue
- Spontaneity: a teacher may use material selected in preparation for a course so soon before the start of the course that seeking permission was not practical, but may not reuse the same excerpted material in subsequent courses or terms without seeking permission. As a practical matter, this means that print coursepacks will not fall under the Multiple Copy fair use guidelines because of the length of lead time necessary for preparing the coursepacks. Copyrighted material in coursepacks should be used with permission.
- Cumulative effect: teacher must limit multiple copy use to one article or two excerpts per author and three excerpts per periodical volume (other than current news periodicals) or

other collective work, in one offering of one course.

- In addition, a copyright notice must be included on all copies distributed to students; the number of copies may not exceed the number of students enrolled in the class; and students may not be charged any fee in excess of the cost of making the copies.

Is that the end of the analysis for fair use in the classroom?

No. The Guidelines define uses that are always safe; they do not purport to define the outside limits of fair use. Copying in excess of these limits may still be fair use, but it will be in a “gray area” that can be hard to defend. Consequently, UNH abides by the Guidelines and advises faculty to seek permission for uses that exceed the guidelines.

I teach Art History. Do I have to buy a license to show slides of paintings in my lectures?

No. The performance or display of a copyrighted work by instructors or students in the course of face-to-face teaching activities is not an infringement of copyright. If the performance or display is from a recording (such as a motion picture or audio recording), it must employ a lawfully made and obtained copy of the work. So, for example, you can buy a copy of a movie on DVD and show it in your film class, but you cannot download a bootleg copy from the Internet and show it. You should not make permanent recordings from radio or TV broadcasts for classroom use, either, although there has never been a definitive ruling on whether this would fall outside the boundaries of fair use. It is acceptable to use recordings of radio or TV broadcasts in class for a period of 14 days after the broadcast.

I have an ASCAP/BMI/SESAC license that permits my students to perform copyrighted music in student recitals and concerts. Can I make a recording of the student’s performance?

Yes, you can. The standard ASCAP/BMI/SESAC license pertains only to performances and doesn’t cover recordings, but the 1976 “Guidelines for the Educational Uses of Music” specifically permit an institution or instructor to make one archival copy of a student performance of copyrighted music and retain that copy. These Guidelines were created by the following organizations: The Music Publishers' Association of the United States, Inc., the National Music Publishers' Association, Inc., the Music Teachers National Association, the Music Educators National Conference, the National Association of Schools of Music, and the Ad Hoc Committee on Copyright Law Revision.

Can I give a copy of the recording to the student performer?

The 1976 Guidelines don’t specifically state the uses you can make of a student recording, but it is accepted practice at most institutions to allow the student to retain a copy of his or her own performances. In addition, faculty and students can listen to archival copies of student performances and use them under the same “fair use” guidelines that would apply to a

commercially available recording of the music.

Can I use copyright-protected work in my e-reserves?

In general, the multiple copy fair use guidelines also apply to e-reserves and to the online use or downloading of electronically stored material. In particular, the right to copy from electronic materials that UNH has purchased is negotiated with the individual publisher or vendor supplying the license, so you should check the terms of the particular work you want to use. You are responsible for verifying that materials you place on e-reserves are password-protected and available only to students in the course.

How do I get permission for uses of copyrighted works that exceed “fair use”?

For most classroom uses, UNH Copying Services can handle obtaining the necessary permission and calculating the cost of any resulting royalties per copy of your coursepack. You can also obtain permission directly by contacting the copyright holder, usually the publisher, of the work you want to use.

III. Copyright-Protected Works in Distance Education

I teach a distance learning class on the Internet; my students hear me lecture, and respond to my classes, online. Can I use copyrighted materials the way I could if my students were “face to face” in a classroom?

Yes, but with some additional restrictions. The 2002 TEACH Act expanded the face-to-face performance or display exception to cover distance education transmissions, with the following additional limitations:

- Only “limited portions” of works other than non-dramatic literary or musical works may be transmitted.
- The display cannot exceed the amount or length of a typical classroom display.
- Transmission can be made solely for and reception limited to students officially enrolled in the course.
- The institution must have established policies on complying with copyright laws which have been communicated to faculty, staff, and students, and students must be specifically advised that the materials excerpted for the course may be subject to copyright protection

What exactly is a “non-dramatic literary work” – does that include or exclude literature?

“Dramatic” means dramatized, not simply fictional. The prohibition on showing the entire work is limited to dramatizations with dialogue. Movies, plays, or operas may not be played in their entirety, but readings or symphonies can be. One caveat, though: A complete transmission must be an “integral part” of the course – directly related to and of material

assistance to the teaching content of the class. As a rule of thumb, if you wouldn't ordinarily read an entire novel or play an entire symphony, etc. in your classroom, you shouldn't post an online reading or recording, either.

Does UNH have an institutional policy in place that meets the requirements of the TEACH Act?

Yes, so you can make "face-to-face" use of materials as described above.

IV. Faculty Copyright Rights

How do I protect copyright in my own work?

You automatically own the copyright in your own work, but you must register your copyright with the U.S. Copyright Office before you can sue someone else for infringing your copyright. Although you can register at any time, "timely registration" within three months of publication will make it much easier to prove an infringement case, should you later have to bring one. Registration is relatively inexpensive (as of 2007, it cost \$45 per work) and simple. Forms can be found at <http://www.copyright.gov>.

Isn't my work for UNH considered "work for hire"?

Copyrightable works developed in the course of completing one's University duties are assigned according to the UNH IP Policy, which can be found at: <http://usnholpm.unh.edu/UNH/VIII.Res/D.htm>. Generally speaking, copyrightable material belongs to UNH if it was developed in the course of a university employee's assigned duties, developed using university resources, or developed in the course of a sponsored research or other binding agreement which dictates the ownership of any resulting intellectual property. The main exception is that in the case of "Exempted Scholarly Works," UNH waives its ownership right in the interest of the author; however, UNH does reserve a non-exclusive, irrevocable, royalty-free right to use the Exempted Scholarly Works for educational and/or research purposes. Examples of Exempted Scholarly Works include: traditional academic publications, academic software, music, theses and dissertations, photographs, video tapes, works of art, etc. UNH VIII.D.8

What happens if I publish my work in a journal that asks me to sign over my copyright as a condition of publication?

Many journals do require that authors sign over some or all of their copyright rights as consideration for the acceptance of the work for publication. As a practical matter you may not be giving up anything of monetary value, if the work is not valuable until a peer-reviewed journal publishes it and/or there is a limited market for selling it. Nevertheless, you should read the terms of any copyright transfer very carefully and be sure you know what you are agreeing to give up. If you have questions about the agreement terms, contact the Office of Research Partnerships and Commercialization for assistance.

V. Student Copyright Rights and Responsibilities

Do students have any rights in the work that they do for my class?

Yes. Students automatically own the copyright in their own work, even though it was written in response to an assignment from you, unless it was created under certain exceptions set out in the UNH Intellectual Property policy. This means both that you cannot appropriate their work without permission (by publishing a compilation of your students' work on a particular subject, for example) and that you cannot exceed "fair use" of the material without obtaining the student's permission. Note, however, that the copyright does not extend to the facts or ideas expressed in the students' work, since those cannot be copyrighted.

Can students quote copyrighted works in their class assignments?

The fair use doctrine applies to students as well as to you, and they may use copyrighted material in order to comment on it under the same terms that you can.

VI. Where To Go For More Information and Advice

Where can I go for more detailed information on how to apply copyright law?

The UNH Intellectual Property Policy can be found at:

<http://usnholpm.unh.edu/UNH/VIII.Res/D.htm>

The UNH Primer on Copyright Law and Recommended Resources can be found at:

http://www.library.unh.edu/loan/loan/reserves_edit/pdfforms/UNH%20Copyright%20Primer.pdf

UNH Printing Services

<http://www.printing.unh.edu/copyright.html>

Digital Millennium Copyright Act (DMCA) Implementation at UNH is described at:

<http://www.unh.edu/cis/dmca/>

UNH Library

<http://www.library.unh.edu/about/polreg/copyright.shtml>

I guess my questions aren't frequently asked – I still have questions. Who can answer them?

Please feel free to contact the following people with additional questions on copyright or to seek advice on a particular project:

UNH Office for Research Partnerships and Commercialization
www.orpc.unh.edu

Bob Dalton, Director

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Maria Emanuel, Ph.D., Licensing Manager

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862-4377

USNH General Counsel's Office

<http://www.usnh.unh.edu/fac/offices/counsel.shtml>

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